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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

vs.

Case Action No. 04-JD-17(Clay County)
Hon. Richard A. Facemire, Judge

T.Y., Jr., et. al.,
Respondents Below, Petitioners.

PETITION FOR AN APPEAL

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PETITION FOR APPEAL FROM ORDER FILED ON JUNE 1, 2005

Now comes the Petitioner, T. Y., Jr.[1], (hereafter referred to as "TY"), by counsel, Wayne King, and offers for this Court's consideration the following in support of his Petition for Appeal:

JURISDICTION

The Circuit Court of Clay County had jurisdiction pursuant to W.V.R.Cr.P, Rule 1, and this Court has jurisdiction pursuant to W.V.R.A.P., Rule 1.

STATEMENT OF FACTS

TY was charged in a Juvenile Petition by Deputy R. D. Belt of the Clay County Sheriff's Department with four (4) separate offenses, namely, (1) Assault on a School Employee in violation of West Virginia Code 61-2-15; (2) Brandishing a Deadly Weapon in violation of West Virginia Code 61-7-11; (3) Assault in violation of West Virginia Code 61-2-9(b) and (4) Reckless Driving in violation of West Virginia Code 17C-5-3. The matter proceeded to trial before a jury on the 22nd day of September, 2004, and the said TY was guilty of Assault on a School Employee and Brandishing a Deadly Weapon.

Counsel for TY filed Post-Trial Motions and the Court denied the said Motions and the said TY was sentenced pursuant to an Order of the Court dated the 31st day of May, 2005, and entered of record on the 1st day of June, 2005, and it is from this Order an appeal is taken.

[1] In keeping with this Court's practice, the minor child shall be identified by his initials.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

In a petition filed by the State of West Virginia on June 23, 2004, it was alleged that TY is a delinquent child under the laws of the State of West Virginia. Specifically, the petition contained the following allegations in support of the assertion that TY was a delinquent child: (1) Assault on a School Employee in violation of West Virginia Code, 61-2-15; (2) Brandishing a Deadly Weapon in violation of West Virginia Code, 61-7-11; (3) Assault in violation of West Virginia Code, 61-2-9(b); and (4) Reckless Driving in violation of West Virginia Code, 17C-5-3. Subsequent to the filing of the petition, the matter was scheduled for jury trial during the July 2004 term of the Circuit Court of Clay County. Trial began on September 22, 2004. A jury was impaneled, evidence and testimony was presented in the trial court, and TY was found guilty of Assault on a School Employee and Brandishing a Deadly Weapon. TY's trial counsel, David Karickhoff timely filed a motion for judgment of acquittal, or in the alternative, motion for new trial; the trial court denied the motions. TY was sentenced properly by order entered on May 21, 2005. Subsequent to the trial court's denial of TY's motions for judgment of acquittal and new trial, his trial counsel, David Karickhoff filed a motion to be relieved as counsel. The trial court granted this motion. Carson Bryan, an attorney practicing the Circuit Court of Clay County was appointed to perfect the petition for appeal for TY. Carson Bryan subsequently accepted employment as the Assistant Prosecuting Attorney for Clay County, West Virginia, and he was relieved as counsel for TY. Thereupon, the trial court entered an Order appointing Wayne King as the third court-appointed counsel for TY for purposes of perfecting his petition for appeal.

It is from the May 21, 2005 Sentencing Order that this Appeal is taken.

A notice of intent to appeal was timely filed. Upon motion of Wayne King, the trial court entered an Order extending the time for the filing of this petition until December 1, 2005.

STANDARDS OF REVIEW

Petitioner contends that the appropriate standards of review are abuse of discretion and de novo.

ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it failed to dismiss the juvenile petition without prejudice prior to the commencement of the trial.

2. Whether the trial court erred when it failed to dismiss the juvenile petition without prejudice at the conclusion of the State's case-in-chief.

3. Whether the trial court erred when it failed to exclude certain members of the jury panel from service and whether the record is complete enough for T.Y. Jr. to present this argument to this court.

4. Whether the trial court erred when it failed to order a mistrial when the juvenile respondent was transported for trial and delivered to the common area of the second floor of the Clay County Courthouse while dressed in an orange jumpsuit and restrained with leg and arm shackles when it is common knowledge that jurors enter and exit the courtroom through the same common area.

DISCUSSION OF LAW AND POINTS OF AUTHORITY

1. **Whether the trial erred when it failed to dismiss the juvenile petition without prejudice prior to the commencement of the trial.**

TY asserts that the trial court erred when it failed to dismiss the juvenile petition without prejudice prior to the commencement of the trial because a review of the petition reveals that it failed to set forth the essential element of venue of all of the offenses alleged in the petition, to-wit: the offenses of Assault on a School Employee, Brandishing a Deadly Weapon, Assault, and Reckless Driving. It is a basic tenet of the

law that the rights of the respondent must be protected at all stages of the proceedings against him. The trial court, upon review of a petition, and prior to the commencement of a trial, is obligated to determine whether the petition is facially valid or whether it is facially defective. The validity of a petition is controlled by the same rules that control whether an indictment is valid.

A review of the petition clearly reveals that venue of the four offenses charged (including both of those of which he was ultimately convicted) was not even alleged in the petition. Thus, the respondent was not apprised of one of the essential elements (that is, where the events that led to the filing of the petition occurred) of the offenses charged in the petition alleging he was a delinquent child under the laws of West Virginia. It is also clear from the record that the State of West Virginia never attempted to amend the petition prior to trial.

In State v. Palmer, 210 W.Va. 372, 377, 557 S.E.2d 779, 784 (2001), this Court held that the failure of an indictment to adequately state the essential elements of a criminal charge is a fundamental defect that may be raised at any time. In the case *sub judice*, the petitioner contends that the trial court should have acted in a gatekeeper capacity and safeguarded the juvenile's rights when it reviewed the petition and found it failed to set forth the venue of three of the offenses alleged to have been committed by the juvenile.

Therefore, TY asserts that the trial court erred when it failed to dismiss the petition without prejudice prior to the commencement of the trial because of the failure of petition to allege venue for three of the four crimes alleged therein.

2. **Whether the trial court erred when it failed to dismiss the juvenile petition without prejudice at the conclusion of the State's case-in-chief.**

TY maintains that the trial court should have dismissed the juvenile petition at the conclusion of the State's case in-chief because the petition failed to allege the venue of those three charges. TY asserts that upon motion of his trail counsel, the trial court should have dismissed the charges of Assault on a School Employee, Brandishing, Assault, and Reckless Driving.

Indeed, at the close of the State's case-in-chief, trial counsel for the juvenile respondent moved the trial court to dismiss the petition because the same failed to allege venue and was thus a facially insufficient petition. The trial court failed to grant the juvenile respondent's motion even though the trial court stated that it did "not feel that venue is established" in the petition. See Trial Transcript, page 119. However, even though the trial court agreed with counsel for the juvenile respondent that the petition failed to establish venue, it took the position that that defect was waived by counsel's failure to raise the issue and seek dismissal of the petition prior to trial. It is important to recognize that at trial, counsel for the juvenile respondent moved the court to dismiss the petition because it was facially insufficient, that is, it was defective. The juvenile respondent's counsel argued that the basis of the facial insufficiency was that the petition failed to set forth the venue of the offenses. The juvenile respondent did not argue that venue itself was improper. Rather, the argument set forth at trial and in this petition is that the charging document, i.e. the petition, is defective on its face because it fails to set forth the essential element of venue.

Juvenile respondents have the right to be tried under a facially valid petition. West Virginia Code, 49-5-2(j) states that "[a]t all adjudicatory hearings held under this

article, all procedural rights afforded to adults in criminal proceedings shall be afforded the juvenile unless specifically provided otherwise in this chapter." Clearly, an adult in a criminal proceeding is entitled to be tried under a facially valid indictment; therefore, a juvenile respondent, in the absence of contrary language in Chapter 49 of the West Virginia Code, is entitled to be tried under a facially valid petition. In the case before this Court, the petition was facially insufficient because it failed to allege provide one of the essential elements for the offenses charged, that is, venue. See State v. Miller, 197 W.Va. 588, 600, 476 S.E.2d 535, 547 (1996), holding that "[a]n indictment as drafted is presumed sufficient if it tracks the statutory language, cites the elements of the offense charged, and provides the other essential details, such as time, place, and persons involved, to provide adequate notice to the defendant."

Furthermore, the State of West Virginia had the right to amend the petition pursuant to Rule 7(e) of the West Virginia Rules of Criminal Procedure. That rule permits amendment of an information at any time prior to a verdict or finding so long as no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced. Rule 7(e) is applicable to a juvenile petition. The State never moved to amend its petition. Because the State failed to seek to amend its petition and because the petition was facially insufficient because it failed to alleged venue, the trial court should have granted the juvenile respondent's motion to dismiss the petition at the close of the State's case-in-chief.

3. **Whether the trial court erred when it failed to exclude certain members of the jury panel from service and whether the record is complete enough for T.Y., Jr. to present this argument to this court.**

The Circuit Court of Clay County, West Virginia, called this matter for trial on the 22nd day of September, 2005, and the Court was informed by the Clerk of the Circuit Court of Clay County, West Virginia, that there were 29 jurors available for service. (See Trial Transcript Page 2, Line 12 and 13) The State of West Virginia announced ready for trial and the Juvenile Respondent announced ready for trial and the trial court had the Circuit Clerk call 20 jurors.

The Court made certain inquiries of the panel and several of the panel members were excused by the trial court and at the time of the conclusion of the questioning by the trial court there remained only one (1) juror available to be called in the event any of the jurors were excused by the court upon request by either the Prosecuting Attorney for Clay County, West Virginia, of the attorney representing the said TY.

The final panel included one individual, namely Sandra Jones, she being Juror #18, and having replaced John Pringle, and after inquiry it was discovered that she was an employee of the Clay County Board of Education, and in fact worked with the complaining witness in the matter, that being the Assistant Principal of Clay County High School. It is further noted that she had information and related the same to the trail court and counsel for the parties that knew that TY lived upon what is known as "Murder Mountain" in Clay County, West Virginia, and had heard rumors regarding the conduct of the said TY in school. (See Trial Transcript Page 33, Line 1 to Page 36, Line 8.)

The evidence as presented by the State of West Virginia mainly consisted of Jim Haney, the Vice Principal of Clay County High School saying that he was threatened and that TY brandished a gun, all of which TY testified never happened. TY stated that he never had a gun in his possession and that he never threatened Mr. Haney. The fact that the evidence as presented is "Jim Haney said-TY said" makes the fact that a co-worker of the complaining witness should have been excluded by the trial court. It should be noted for the record that Clay County is a rural county and there is only one high school, namely, Clay County High School, where Mr. Haney, the complaining witness is Vice Principal and only one middle school, namely, Clay County Middle School, where Mrs. Joan Haney, wife of Jim Haney, the complaining witness is the principal.

In the case of State v. Bennett, 181 W.Va. 269, 382 S.E.2d 322 (1989) this court stated:

> A prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a per se disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case, After establishing that such a relationship exists, a party has a right to obtain individual voir dire of the challenged juror to determine possible prejudice or bias arising from the relationship.

In the case at hand there is no doubt that there exists a relationship between the said Juror, Sandra Jones, and the complaining witness, Jim Haney. In fact, either he or his wife may be her immediate superior, as she is an employee of the Clay County Board of Education as a school cook. Her relationship is especially important when the entire case for the State of West Virginia relies on the testimony of Mr. Haney, to which TY denies. Clearly, it can be argued that the complaining witness stands in the same light when determining if a juror should be struck for cause as a police officer when determining if there exists any bias or prejudice. Clearly, TY was prejudiced for the failure of the trial

court to remove Sandra Jones from the jury panel for cause. The examination of the juror by the trial court falls far short of the examination, either in open court or in chambers as individual voir dire, contemplated by this Court in deciding if a juror is free from bias or prejudice.

The trial court made inquiry of Juror #4, Barbara Sizemore, and it was discovered that she was the mother of Chad Sizemore, he having been a Deputy Sheriff of Clay County, West Virginia, and also being the complaining witness in another juvenile petition against the said TY that was currently pending at the time of the trial in this matter. (See Trial Transcript Page 36, Line 10 to Page 37, line 23) The said Chad Sizemore was believed to be at time of the trial employed as a City Policeman for the Town of Richwood, the said Chief of Police, namely Kevin Delk, being another former Deputy Sheriff of Clay County, West Virginia. The failure to disqualify Barbara Sizemore was in violation of the standards pronounced by this Court in State v. Archer, 169 W.Va. 564, 289 S.E.2d 178 (1982) when this Court stated "that the near relatives of law enforcement officers should not serve on panels for criminal trials." This principal was also stated in State v. Maynard, 170 W.Va. 40, 289 S.E.2d 714 (1982) and the fact that Barbara Sizemore, mother to a former Clay County Deputy Sheriff, now believed to be a City Policeman for the City of Richwood, and also the complaining party in a juvenile petition against TY that was still pending is error and TY should be awarded a new trial. The trial court, in determining if the said Barbara Sizemore should be allowed to serve as a juror had a informal side-bar in open court and never desired to have a hearing in chambers so that obvious bias and prejudice could be explored. The trial court had a duty to conduct jury voir dire in such a full and complete was as to determine if any

prospective juror had any bias or prejudice, even if said bias or prejudice may not be know to the juror at that time. In any event, Barbara Sizemore, because of her being the mother to a former Clay County Deputy Sheriff, said Deputy Sheriff being a complaining party on another juvenile petition pending against TY, should have been struck for cause.

The trial court did not strike either of the said jurors, namely Sandra Jones or Barbara Sizemore for cause and the failure to do so was error. The counsel for TY was forced to use one of his peremptory strikes to take Barbara Sizemore from the jury panel and was unable to have enough peremptory strikes to remove the same Sandra Jones, so this employee of the Clay County Board of Education was a juror setting in judgment of the said TY, the said TY having been charged with an Assault on a School Employee.

The trial court chose to start the trial with only 29 jurors available for service and the said TY should nor be prejudiced with the fact that his counsel had dto use peremeptory jury strikes to remove jurors which this trial court shold have removed for cause. However, it is clear had the trial court dismissed the two (2) jurors (Sandra Jones and Barbara Sizemore) for cause, the trial could not have started on that day as there was not a sufficient number of jurors to cause a panel of twenty (20) jurors to be available, free and any bias or prejudice, which would be reduced to a panel of twelve (12) jurors to try the issue joined after the peremptory strikes of the parties hereto. TY should not be prejudiced by the trial court's rush to cause this matter to be presented to a jury,

The record will show that the counsel filing this appeal ***was not*** the counsel representing TY at the trial of this matter and a review of the trial transcript which recorded the jury selection process revealed at least EIGHTY (80) responses as being "(INAUDIBLE)". Therefore, as a practical matter, the counsel reviewing the record of

the jury selection process could not totally determine if the jury selection process contained other errors, as the trial transcript is not complete on its face. The right of TY to have a full and complete record for review by this Court is a principle of law which this Court should pronounce so that all recording of trials, especially criminal trials, can be fully and completely reviewed not only by the counsel perfecting the appeal, but by the members of this Honorable Court.

4. **Whether the trial court erred when it failed to order a mistrial when the juvenile respondent was transported for trial and delivered to the common area of the second floor of the Clay County Courthouse while dressed in an orange jumpsuit and restrained with leg and arm shackles when it is common knowledge that jurors enter and exit the courtroom through the same common area.**

At the time of the trial in this matter, the said TY was in the custody of the State of West Virginia, the said TY being detained at the James H. Morton Juvenile Center located in Dunbar, West Virginia. By letter dated the 20th day of September, 2004, the counsel for TY requested that the said TY appear for trial in civilian clothing and free of handcuffs and/or shackles. (See Exhibit "A") The trial court by an order dated the 21st day of September, 2004, stated the following: "It is further ORDERED that the Tiger H, Morton Juvenile Facility shall dress the infant respondent in civilian clothes when he appears in the Courtroom or before the jury." (See Exhibit "B") Notwithstanding this court order, the said TY was transported for the jury trial in this matter and delivered to the Witness Room #2 on the second floor of the Clay County Courthouse in leg shackles and handcuffs and dressed in the prison attire, the said TY to then change clothing at the time of trial.

The witness room to which TY was delivered in prison attire and in shackles and handcuffs in on the 2nd floor of the Clay County Courthouse. (See Exhibit "C" Partial Floorplan of 2nd Floor, Clay County Courthouse.) In order for a person to get to the witness room, that person must travel through the hallways of the courthouse, go in front of the Circuit Clerk's Office, and then pass by the entrance to the Courtroom, all of these areas being general areas open to the general public and especially available to jurors that may be attending any court hearing that are being held that day. The fact that TY was placed in this area in prison attire, shackles and handcuffs was in direct violation to the Order of the trial court dated the 21st day of September, 2004, and TY was prejudiced by this violation of the trial court's order.

The Supreme Court of the United States of America has recently determined that it is a violation of the rights of the accused, even at the penalty stage, to exhibit an accused before a jury in shackles. Beck v. Missouri, 125 S.Ct 2007 (2005)

The criminal process presumes that the defendant is innocent until proven guilty. Coffin v. United States, 156 U.S. 432, 453 (1895) Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. Estelle v. Williams, 425 U.S. 501, at 503 (1976)

In the case at hand, the trial court entered an order stating that the said TY should not be presented in shackles and/or handcuffs and the said TY was denied a fair trial when the said juvenile facility failed to obey the order of the trial court.

There is no evidence that the State of West Virginia presented any argument which would have justified the said TY appearing in prison attire, shackle and handcuffs and therefore the said TY should have been transported in street clothing, unshackled and not handcuffed upon arrival at the Clay County Courthouse on the 22nd day of September, 2004, for trial.

PRAYER

TY prays that this Court grant this Petition for Appeal, allow him to file an appellate brief in support of his appeal, and ultimately he prays that this Court overturn his conviction and sentence in the lower court and remand this matter for a new trial with instructions, and for such other and further relief that this Court may deem fair, reasonable and just.

T.Y., Jr.

By Counsel

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N THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CERTIFICATE OF SERVICE

I, Wayne King, hereby certify that on this the 29th day of November, 2005, I served a true copy of the foregoing **Petition for Appeal** upon the attorney for the State of West Virginia, Jim E. Samples, Esquire, Prosecuting Attorney for Clay County, West Virginia, by hand delivering the same to the Office of the Prosecuting Attorney for Clay County, West Virginia.

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